

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES	:	
	:	
v.	:	CRIMINAL NO. 92-288
	:	
MUHAMMAD ASKARI	:	

MEMORANDUM ORDER

Defendant was indicted on May 21, 1992 for bank robbery in violation of 18 U.S.C. § 2113(a). On June 30, 1992, defense counsel motioned the court for a hearing to assess defendant's competency to stand trial. A hearing was held on July 8, 1992 at which Dr. Timothy Michals testified about defendant's psychiatric state. The court determined that defendant was competent to stand trial. During trial, defense counsel informed the court that defendant had not received his medication that morning and had indicated to her that he was hearing voices. The court then held a hearing at which it heard testimony from Dr. Jeanette Jimenez-Silva. The court concluded that defendant was competent to stand trial. The trial continued and a jury found defendant guilty on July 13, 1992.

On January 29, 1993, prior to defendant's sentencing, defense counsel filed another motion for a competency hearing. The court held a hearing on February 12, 1993 at which it heard testimony from Doctors Edward Guy and Catherine Barber. The court found that defendant was not competent to be sentenced and provisionally committed him to the custody of the Attorney General under 18 U.S.C. § 4244(d).

Upon the filing of a certification of competency from the institution in which defendant was housed, defendant was sentenced on July 27, 1995 to 210 months of imprisonment. Defendant appealed his sentence to the Third Circuit which affirmed the sentence on March 5, 1997. The Circuit Court then granted a rehearing en banc and again affirmed defendant's sentence on April 8, 1998. When the Sentencing Commission adopted an amendment to U.S.S.G. § 5K2.13, which governs departures for diminished capacity, the Circuit Court granted a motion for reconsideration and on November 6, 1998 remanded this case for resentencing pursuant to the amended guideline.

Defense counsel sought time to prepare for resentencing. The court scheduled sentencing proceedings for May 26, 1999. Those proceedings were twice continued upon request of defense counsel. Then, before the new time for resentencing, defendant filed a pro se motion for a new trial.

The court could not then resentence defendant unless and until his motion for a new trial were denied. It appeared to the court, however, to be inappropriate to adjudicate a motion of an uncounseled defendant in pre-sentence status with a psychiatric history. Yet, following the filing of the motion, defense counsel sought to withdraw because of perceived issues regarding the competency or effectiveness of trial counsel, a fellow member of the Federal Defender's Office. On May 17, 2001,

defendant filed a Motion for New Counsel in which he suggested the ineffectiveness of trial counsel and conflict with current counsel. The court has endeavored to secure a CJA attorney who would be prepared to assert and argue ineffectiveness by a veteran member of the Federal Defender's Office.<sup>1</sup>

In the meantime, defendant filed a pro se Petition for Mandamus on September 13, 2001 by which he seeks to compel the court to reduce his sentence by 36 months, defendant's calculation of the time between November 6, 1998 and September 13, 2001. While defendant will, of course, be given credit for all time served, he is currently under no sentence which could be reduced.

If what defendant actually wants is to proceed to resentencing and he is abandoning his request for a new trial, a sentencing proceeding could be held immediately with current counsel. There would be no prospect of a conflict in those circumstances.<sup>2</sup> Defendant could still challenge the conviction itself on ineffectiveness grounds, if he wished, under 28 U.S.C. § 2255. Indeed, ineffective assistance of trial counsel is generally an issue to be raised by way of a § 2255 petition. If

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<sup>1</sup>The Federal Defender's Office reviews applications and makes recommendations for certification of CJA counsel.

<sup>2</sup>It would, of course, also be more efficient. New sentencing counsel would have to replicate the significant efforts to prepare for such a proceeding already undertaken by current counsel during the requested continuances.

defendant wishes to pursue a new trial pre-sentencing, this should be done with proper counseling and not pro se.

The court believes that without breaching any professional standard, current counsel could at least consult with defendant about his options and the potential risks of pro se submissions, and assist him in clarifying precisely how he now wishes to proceed.

**ACCORDINGLY**, this       day of September, 2001, **IT IS HEREBY ORDERED** that defendant advise the court within thirty days whether he wishes to proceed to resentencing, in which event a sentencing proceeding will again be scheduled, or seeks a new trial prior to resentencing, in which event the court will proceed with efforts to enlist new counsel and then resolve all issues pertinent to a request for a new trial.

**BY THE COURT:**

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**JAY C. WALDMAN, J.**